THE SUCCESSOR RIGHTS AND RELATED EMPLOYER PROVISIONS OF THE ONTARIO LABOUR RELATIONS ACT

R.O. MacDowell
Vice Chairman OLRB

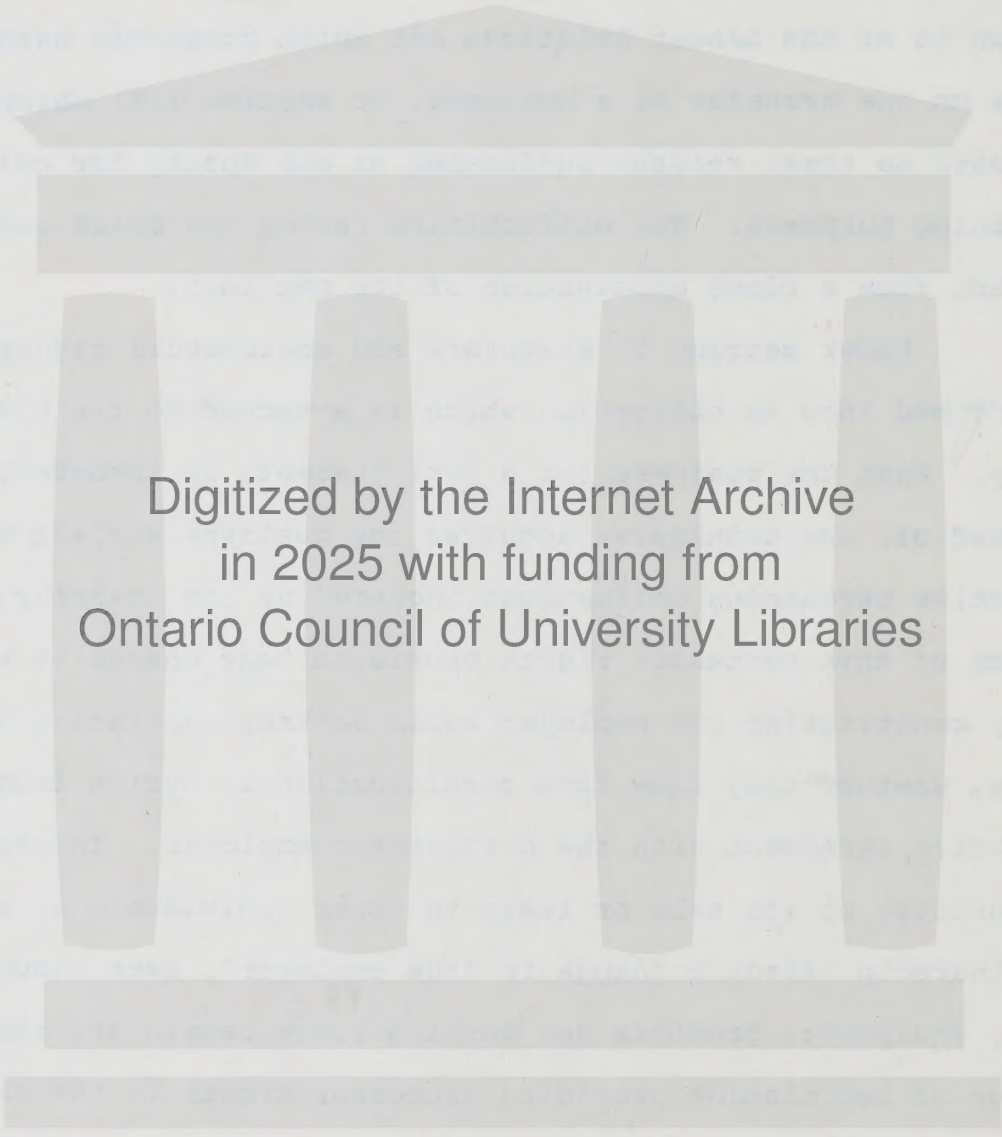
KF
3321
.M138
c.1

INTRODUCTION: ORIGIN AND PURPOSE OF THE PRESENT LEGISLATIVE SCHEME

Situations involving corporate personality and the "lifting of the corporate veil" present some of the most difficult problems facing the Labour Relations Board. These problems arise either under section 55 of the Labour Relations Act which preserves bargaining rights on the transfer of a business, or section 1(4) which permits the Board to treat related businesses as one entity for collective bargaining purposes. The difficulties facing the Board are readily apparent from a close examination of the sections.

Under section 55 statutory and contractual rights are transformed into an obligation which is attached to the business entity. When the business (or a part thereof) is transferred or disposed of, the transferee acquires the business subject to the collective bargaining obligations incurred by the transferor. In the absence of this successor rights provision "any change in the legal entity constituting the employer would destroy subsisting bargaining rights, whether they flow from certification or derive from a collective agreement with the predecessor employer. Incorporation of the business or its sale or lease to other individuals or a change in a partnership effect a change in "the employer", even though the plant, equipment, products and working force remain the same. In the absence of legislation providing successor rights in the case of transfer of ownership of the business, the employer would be in a position to terminate the bargaining rights of a trade union by unilateral action."[1]

ONTARIO LABOUR RELATIONS BOARD
JUL 24 1985
LIBRARY



Digitized by the Internet Archive
in 2025 with funding from
Ontario Council of University Libraries

https://archive.org/details/successorrightsr00macd

In a number of cases in the 1950's and early 1960's trade unions indicated their frustration at being powerless to remedy a simple and obvious scheme to defeat bargaining rights - even in circumstances where anti-union animus was clear. The situation faced by trade unions was aptly described by David Lewis, Q.C., in his submissions to the Royal Commission on Labour Management Relations in the Construction Industry:[2]

> "Unions and employees have time and again experienced frustration and loss of rights due to a change in the legal entity of an employer. An unincorporated firm is incorporated, or a holding company takes over the actual operation of a business, or some similar purely technical re-arrangement and change of legal entity has resulted in loss of bargaining rights, seniority rights and the like. The employees continue to work for essentially the same people, under the same supervision, have precisely the same work in the same place under the same conditions. Yet they find themselves suddenly without a union and without a collective agreement which they had had the day before...."

Commissioner Goldenberg was sympathetic to the unions' concern, and proposed the enactment of successor rights legislation, - just as the Select Committee of the Ontario Legislature on Labour Relations (1957-1958) had done some four years earlier. The first statutory provisions were enacted by SO. 1961-62 c.68 and were in most material respects similar to the present section 55.

The successor rights "problem" has remained essentially the same over the years, but the legislative response (as evidenced by the statutory language) has undergone an incremental shift in emphasis. The first statutory amendment (supra) was never proclaimed, and when it was reintroduced as S.O. 1962-63 c.70, there was a significant alteration. The subsection ensuring a "flow through" of the collective agreement [now section 55(2)] was omitted. The implication is that the Legislature intended only to preserve the bargaining rights of the trade union, but was not concerned to preserve the established rights of employees, or the attributes of the employment relationship which were embodied in the collective agreement. This was noted in the leading (and much cited) Thorco Manufacturing Ltd. case: 65 CLLC 16052. While commenting upon the broad remedial thrust of the legislation and the evident intention to preserve bargaining rights, the Board recognized that the new employer remained free to negotiate a new agreement with the union:

> "It is manifest that the object sought to be attained by section 47a of the Act is to maintain and continue the bargaining rights of a union for the employees in the bargaining unit represented by it, when the business or the part or parts thereof in which such employees are employed is sold (which term is also by the section made to include leased, transferred or otherwise disposed of) to another employer. It is to be noted that unlike some successor legislation to be found in other jurisdictions (e.g. British Columbia and Manitoba) section 47a does not operate to bind the successor of the business with the collective agreement which may have been made between the union and the predecessor employer but only with the obligation to recognize the union's bargaining rights for his employees in a like bargaining unit. The new employer is, therefore, left free to bargain for and to negotiate his own agreement with the union. In passing this enactment, the Legislature was no doubt fully cognizant of the fact that transfers and other dispositions of businesses and parts thereof are often implemented, result from, and are caused by a variety of transactions of different forms and permutations, not excluding those which result from the operation of law. The circumstances which will determine and influence the nature and form of the transaction effecting such transfer or other disposition are not, of course, capable of definitive enumeration; much, no doubt, will depend upon the nature of the business, the reason for and the purpose of the transaction, the position of the parties, the bargain sought to be effected by the transfer or other disposition etc."

The Act prevented "schemes" designed to subvert the union's bargaining rights, and preserved the structure of the bargaining relationship, but it did not preserve the benefits which had been established through collective bargaining.

By 1970, the Board had begun to distinguish two distinct purposes for the successor rights legislation. The panel in Aircraft Metal Specialists Ltd. [1970] OLRB Rep (Sept.) 703 put it this way:

> "The purpose of section 47a becomes important in assessing the various fact situations that arise. Section 47a operates on a number of levels. The first level of course is to prevent the subversion of bargaining rights by transactions which are designed to get rid of the union. We have encountered situations where there are transactions between various corporate entities which are in effect "paper transactions", and are a form of corporate charade engaged in for the purpose of eliminating the trade union. In this type of case the Board has liberally interpreted section 47a to preserve the bargaining rights and has attempted to look beyond "paper transactions" to achieve that purpose. See e.g. Kem's Masonry, December 1964, OLRB, Mthly. Rep., 382 and Trenton Riverside Dairy, September 1964 (1964) 2C.L.S. 76-1005.
>
> A further and important purpose of section 47a is to preserve the bargaining rights with respect to work which has accrued to the benefit of the employees as a result of their union becoming the bargaining agent through certification or voluntary recognition. Once the union had been recognized with respect to a particular business the union then obtains a right to bargain with respect to wages, hours and other conditions of employment in that business. The right to participate in the business and its functions in that manner is in the nature of a vested right and section 47a allows the union to pursue that bargaining right when all or part of the business is sold. In making determinations under section 47a therefore, the Board is interested in maintaining the bargaining rights where the sale involves a continuum of the business."

This approach, which emphasizes the preservation of bargaining rights even in bona fide business transactions (i.e. where there was no anti-union animus), was apparently accepted by the Legislature, for in 1971 it reintroduced the provision preserving collective agreements and, in addition, introduced what is now section 1(4) concerning "related employers".

Section 1(4) is designed to deal with situations where the economic activity which gives rise to employment relationships regulated by the Act, is carried out by, or through, more than one legal entity. Where such legal entities carry on related business activities under common control and direction, it may not make "industrial relations sense" to allow the legal form to dictate, and possibly fragment, the collective bargaining structure. Thus, pursuant to section 1(4), the Board has a discretion to treat them as "one employer" for the purposes of the Act.

In contrast to section 55 which operates automatically upon the "sale" or "transfer" of a business, section 1(4) does not operate automatically for the Board retains the discretion not to apply it even though the statutory preconditions for its application may be present. The Board's discretion is exercised in a particular situation in accordance with the circumstances and having regard to the "mischief" which the section was designed to avoid.

The Board commented upon the purpose of section 1(4) in Industrial Mines Installations Ltd. [1972] OLRB Rep (Dec.) 1029:

> "Section 1(4) is obviously contemplated to cure the mischief that results from being unable to properly define and tie down the employment relationship. In many situations where companies have a close relationship an employee may be shifted from one company to another so that his employment relationship, at any given period, is difficult to define in terms of one employer. So too, the number of employees employed by one of those companies at any given time may be impossible to ascertain.
>
> Prior to the enactment of section 1(4), where such situations existed, it was difficult to define the employment relationship and to determine the proper employer for certain purposes under the Act. For example, in certification proceedings it was necessary to determine the proper employer in order to determine whether the union had sufficient membership among the employees to be certified.
>
> Also, in some situations where a union had been granted bargaining rights for the employees of one employer, the employees could be shifted to another associated or related employer with the result that the bargaining rights which had been earned by the trade union for the employees was lost.
>
> So too, in the case where associated or related employers joined in a common enterprise and used one work force, which was shifted and transferred from time to time, the certification with respect to one employer only was, in effect, a certification of a segment of the total enterprise, and could seriously impair the totality of the business operations by inhibiting the shifting of employees between union and non-union segments of the enterprise. It was also possible in situations where associated or related companies carried on a single enterprise that employees of the separate legal entities could be represented by different trade unions so as to cause the bargaining rights within the single enterprise to be unduly fragmented. An example of the type of situation where section 1(4) was applied is found in Walters Lithographing Company Limited, et al, [1971] OLRB Rep. 406.
>
> It is in these types of situations that the interests of the parties in having the Board treat separate employers as constituting one employer for the purpose of the Act became apparent, and it is for that reason that section 1(4) was enacted."

By the mid-1970's, both the remedial thrust of the legislation (mentioned in Thorco) and a recognition of its dual purpose had become firmly entrenched in the Board's jurisprudence.

In Dufferin Steel Co. [1976] OLRB Rep (Mar.) 81, for example, the Board remarked:

> "The Board must have regard for the purpose of section 55 in applying the section to the facts of a particular case. It is obvious that the section is intended to prevent the undermining or subversion of bargaining rights by means of transactions designed to allow an employer to escape his contractual and/or legal obligations with respect to a trade union. The transactions described in this case were not undertaken for the purpose of eliminating a trade union or of undermining a collective bargaining relationship. These were arm's length transactions undertaken for business reasons. The section, however, was also designed to preserve bargaining rights in those situations where the transactions result in a "continuum" of the business. The Board in this latter type of case must determine if there has occurred "a transfer of sufficient of the enterprise to constitute a sale of business". The rationale in support of this second and equally important purpose of the section is well stated in the Aircraft Metal Specialists Limited case [1970] OLRB Rep. Sept. 702."

Anti-union animus was but one of a number of factors which the Board might consider (see: Marvel Jewelry Ltd. [1975] OLRB Rep (Sept) 733).

A final significant amendment occurred in 1975 when sections 1(5) and 55(13) were added to the Act. These sections required respondent employers to adduce the facts which were material to the related employer, or successor rights application. Prior to th se amendments, there was no obligation on employers to come forward with such evidence, even though the facts concerning the alleged "sale", or corporate relationship, were exclusively within their own knowledge. The burden of proof was (and still is) on the applicant to establish the evidentiary basis for a remedial declaration, but, in the absence of any procedure for "discovery" this proved a formidable task. In a number of cases prior to 1975, the Board remarked upon the inadequacy of the evidence, and went on to dismiss the union's application for relief. The new amendment did not alter the Board's remedial authority, but did increase the likelihood that the evidence necessary to sustain a remedial declaration would come out at the hearing.

Like all adjudicative tribunals, the Board refines and develops its jurisprudence through the resolution of concrete disputes arising in a variety of industrial contexts. It is to be expected that the Board will adapt and shape the law to meet new situations - indeed it is essential that it do so if remedial provisions, such as sections 55 and 1(4), are to be given effect. Law "develops", and early cases do not necessarily provide an unfailing guide to the results in later ones. However, the wide range of circumstances in which sections 55 or 1(4) might apply, and the the statute itself, make it especially difficult to discern a clear pattern of decisions, precisely defining the extent of these sections.

Prior to 1971, the related employer provisions were not available, yet it is apparent that many of the cases could have been argued on that basis; and it is now quite common to allege both sections 55 and 1(4), and to argue in the alternative. Even in the years immediately after 1971, parties were less likely to "marry" a 1(4) and 55 application. As late as 1973 in Canac Shock Absorbers Ltd. [1973] OLRB Rep (Oct.) 508, it was argued that sections 55 and 1(4) could not both apply to a particular transaction (the Board rejected this contention). In addition, I have already noted the shifting rationale, the decreasing emphasis on anti-union animus, and the practical significance of the requirement to bring relevant evidence before the Board. All of these factors might have influenced the result in a particular case and, in consequence, one must read the earlier cases subject to these considerations.

Related Employers

The origins and purpose of section 1(4) have already been mentioned. There are three conditions which must be present before it can be applied:

(a) there must be more than one corporation, firm, individual, association, or syndicate involved;

(b) these entities must be under common control or direction; and

(c) they must be engaged in associated or related business activities.

In an early case, Walters Lithographing Co. Ltd. [1971] OLRB Rep (July) 406, the Board laid down criteria for a 1(4) declaration which have been consistently considered and appled in subsequent cases:

(a) common ownership or financial control;

(b) common management;

(c) interrelated operations;

(d) representation to the public or to other businesses that the employers are in fact a single enterprise;

(e) common control of labour relations or personnel policies.

In making its determination the Board considers a number of indicia: common premises, stationery or telephone numbers; common solicitors; common trademarks, logos, colour schemes, signs or similar names; common supervision, sales staff, or management; common personnel, accounting, banking or invoicing procedures; payment of employees by common cheques; interchange of employees who perform similar work for each of the related entitities... etc.[4] The greater the degree of functional coherence or interdependence among the various business activities, the more likely it is that the criteria above will be satisfied. Subject to section 1(5), the burden of establishing these criteria lies upon the party invoking section 1(4).

The business activities referred to in section 1(4) need not be carried on simultaneously, nor need they be the principal business activities of the employer. In Elmont Construction Ltd. [1974] OLRB Rep (June) 342, for example, the Board held that a general contractor and a "developer" shared a "common meeting ground in the area of construction", and went on to apply 1(4). Moreover, it is possible for two previously unrelated entities under common control and direction to become related and, subject to 1(4), if there is a change in the nature of their business activities. In West York-Bau [1978] OLRB Rep (Sept.) 879, a 1(4) declaration was granted in respect of a previously dormant company which was reactivated and began to engage in the same business as its corporate cousin. When the union immediately moved to assert 1(4) the Board found that the requirements of the section had been satisfied and a declaration was made. On the other hand, the fact that two business entities are engaged in common business endeavor or joint venture does not establish that the constituent companies are under common control or direction.[3]

Prior to 1975 it was impossible to seek a 1(4) declaration directly; it could only be sought in the context of another application. Nevertheless the Board is now clearly entitled to apply 1(4) in any application where it might be relevant[5] (subject of course to the giving of proper notice - see: Del Zotto Enterprises Ltd. [1974] OLRB Rep (Aug) 533; section 93 and Rule 54). Section 1(4) is

most commonly sought in certification applications. (Del Zotto supra, Walters Lithographing supra) or, in successor rights applications (Canac supra, Elmont supra). In Napev Construction Ltd. [1976] OLRB Rep (Mar) 109 a union sought a 1(4) declaration in a section 112a (arbitration) application in an effort to bind a related employer to an agreement which contained a restriction on subcontracting. The union alleged that the related company was merely a device created to avoid the no-subcontracting requirement. A 1(4) declaration was granted.

The power to make a declaration under section 1(4) is discretionary and the Board has consistently held that its purpose is to preserve not extend bargaining rights. Thus, where an employer is bound by a collective agreement with a trade union, and another trade union seeks bargaining rights for a related employer the Board will not permit section 1(4) to be used to bind the related employer to an existing agreement and thus raise a contract bar to the certification application.[6] Nor will the Board permit 1(4) to be the vehicle to disturb an established bargaining structure so that a previously independent bargaining relationship can be "plugged in" to a master agreement.[7] (But note that this might be the effect if the related employers are in the construction industry and all or part of their related activities are covered by the new province wide bargaining scheme.)

A crucial factor in determining whether the Board will exercise its discretion to make a 1(4) declaration is the applicant's delay in seeking relief.[8] The rationale for this position was explained in Farquhar Construction Ltd. [1978] OLRB Rep (Oct):[9]

In emphasizing the importance of a trade union acting promptly - when confronted with a multi-entity situation - the Board's concern is not simply to avoid the situation where bargaining rights may be acquired by another trade union - the concern expressed in Industrial Mine. Because the application of section 1(4) may involve an accretion to an existing bargaining unit, the Board has been increasingly concerned to avoid imposing bargaining rights on employees who may desire to remain unrepresented, or perhaps to be represented by another trade union. Where a union moves to protect its bargaining rights with dispatch, the need for stability in collective bargaining must take precedence over the wishes of the new employees. In such circumstances, the position of the new employees may be likened to that of employees hired as a result of a post-certification build-up of an employer's work force. They may not wish collective bargaining; but that is the structure which has been established to govern their employment relations - at least until such time as an application for termination becomes timely. Where, however, a union chooses to sleep on its bargaining rights and allows an employer to carry on with an unorganized workforce, the rights of the unorganized employees must be given consideration. This approach to the application of section 1(4) can be seen in Zaph Construction Ltd. [1976] OLRB Rep. Nov. 741 where the Board refused to use section 1(4) to establish a contract bar in a situation where the party requesting it had left bargaining rights exposed, and more recently in Ellwall and Sons Construction Limited [1978] OLRB Rep. June where the Board declined, on the ground of delay, to exercise its discretionary power. (See also Inducon Construction).

The Board recognizes that the erosion of a union's bargaining rights may occur gradually and that there will be cases where the erosion is not immediately apparent. For that reason, we will be careful to avoid imposing upon applicants a standard of diligence which is unduly onerous. Where, however, a union does not seek relief within a reasonable period from the time at which it becomes (or ought reasonably to have become) aware that its bargaining rights are being eroded, the Board will decline to exercise its discretion and will insist that it proceed by way of the normal certification procedures.

The converse to the principle that the bargaining rights of a union should be protected from erosion by employer manipulation of the corporate form is that the appearance of a new corporate entity should not be the occasion for an expansion of bargaining rights into a previously unrepresented area. That is, without a showing by the applicant that it has the support of a majority of the employees in the new grouping. If the

> Board were to use section 1(4) or section 55 so as to confer upon a union bargaining rights which it did not previously possess (or which it had long since abandoned) it would be ignoring the fundamental policy - stated in the preamble to the Act and reflected in section 3 - that collective bargaining is to be between employers and unions as the freely designated representatives of employees. For that reason, the Board has consistently held that the relief available under section 1(4) and section 55 is not to be sought as a substitute for obtaining bargaining rights through normal certification procedures. (See, most recently, D. L. Stephens Contracting Niagara and Stephens and Bass Limited, [1978] OLRB Rep. June and Bryant Press Ltd., [1972] OLRB Rep. Apr. 301.)

It is not the passage of time or any particular period of time which is relevant here, rather it is the Board's reluctance to thrust a bargaining relationship and structure upon employees who might prefer a different bargaining structure or bargaining agent, or perhaps no bargaining agent at all. It sould be noted that in Farquhar there was no doubt that the requirements for section 1(4) had been met. The employer did not seek to hide the fact that for some years he had operated in a "double breasted fashion" - that is, through a "union" and a "non-union" company. Likewise in Zaph Construction [1977) OLRB Rep (Nov) 741, the respondent employers acknowledged that they were in fact related but argued (successfully) that the Board should exercise its discretion not to so declare.

The simplicity of the foregoing masks a difficult issue which is inherent in section 1(4): in order to determine whether two entities carry on "related" business activities, it is necessary to characterize "the business" in which each is engaged. Determining precisely what is the employer's "business" has been a perplexing problem under section 55 of the Act (see infra) but, to date, the Board has not had to analyze this issue in relation to section 1(4). Two recent cases will illustrate the problem.

In Diversey (Canada) Ltd. [1978) OLRB Rep (Sept) 814 a union sought a 1(4) declaration in relation to "D" and "D.E.P.L.". Both companies shared common corporate links and overall financial management, but they were not integrated at the operation level, nor were the employees confused as to their 'real' employer even though all of the employees of both companies were paid by cheques emanating from D. There was no interchange of employees. D produced a broad range of chemical products, while DEPL produced one specialized chemical product requiring the input of much more highly skilled labour. The firms were clearly under common control and direction. Both were "in the chemical business" and were thus "related" in a general sense. Nevertheless, the Board declined to make a 1(4) declaration because in its view the companies did not carry on associated or related business activities. DEPL was not a mere instrumentality of D and the character of the work performed by employees was quite different. It did not make industrial relations sense to treat them as one employer.

In Min-A-Mart, Ltd. [1978] OLRB Rep (Nov), on the other hand the Board found that a supermarket chain and a chain of convenience food stores were both in "the retail food business" even though the convenience food stores were smaller, had a different range of products, had different hours of operation, served a different market and required employees to perform a broader range of duties. Accordingly, the Board found that the firms were engaged in related business activities within the meaning of section 1(4).

These cases suggest that the characterization of "the business" may well be as important, and difficult in applications under section 1(4) as it is in successor rights applications (and it

should be observed that section 1(4) neither refers to "similar" businesses nor contains language such as that in section 55(5) respecting the "character" of the business).

Successor Rights

The purpose of the successor rights provisions has already mentioned *supra* and the scheme itself is relatively straightforward. The union retains bargaining rights for the employees in a "like unit" to that which existed prior to the "transfer", and the transferee must apply the collective agreement to the predecessor's employers in that unit, until the Board otherwise declares.[10] If the transferee substantially alters the character of the business the Board may terminate the union's bargaining rights.[11] If the successor employer intermingles the unionized employees which he has "acquired" with his other employees, the Board may redefine the appropriate bargaining structure, and may determine whether the union's bargaining rights should be continued.[12] Where the union represents some of the employees in the new bargaining structure, but the remainder are either unrepresented, or represented by another union, the Board will hold a representation vote. If, however, the union represents the overwhelming majority of such employees or, alternatively, only a tiny proportion of them, the Board may dispense with a representation vote, and determine the union's status directly.[13] In general, the section, like section 1(4), is designed to *preserve*, not *extend*, bargaining rights.

The application of this simple scheme to particular fact situations has raised difficult issues of law and policy. For the purposes of exposition, the discussion hereunder deals with a number of these questions separately. It will become readily apparent, however, that the problems are interrelated and cannot be considered independently.

"Transfer.. and any other manner of disposition"

While the application of the successor rights provisions is often considered in circumstances where there has been a "sale" of a business, the scope of section 55 is much broader than that, and embraces many noncommercial or even involuntary transfers. As the Board observed in Thorco (supra) at p. 787:

> "According to its strict signification, the term sells is usually taken to describe a transaction involving the disposal of property by one to another in consideration of a sum paid or agreed to be paid by the recipient in money or its equivalent. As used in section 47a, however, the word sells has been given a wide definition which includes lease, transfers and any other manner of disposition of the business or part thereof. In legal parlance the word lease generally denotes a specific kind of contract by which one party, called the lessor, for a consideration in money or its equivalent, confers on another, called the lessee, the exclusive possession of certain property for a period of time.
>
> The word transfers, however, is obviously a term of wide significance and unless restricted by the context is capable of describing a multitude of transactions whether by sale, exchange, gift, trust or otherwise by which property, rights, or interests, etc. are transmitted absolutely, conditionally etc. or by operation of law from one person to another. We are unable to find anything in the language of the section to denote any legislative intention to restrict the meaning of the word transfers to any particular kind of transfer. Also, having regard to the particular language used and the remedial object sought to be attained by and the wide meaning which must be attributed to the preceding word transfers, it is our opinion that the generality of the words any other manner of disposition is not intended to be in any way limited or interpreted ejusdem generis with the words leases, or transfers. In our opinion, it is more in harmony with the language of and the remedy envisaged by the enactment to interpret the words and any other manner of disposition as an omnibus or saving provision intended to include dispositions of the business or a part or parts thereof by any mode or means whatever which are not appropriately described by the preceding words which state that sells includes leases or transfers."

And on the proper approach to the construction of the section the Board held:

> "It is a rudimentary principle applicable to the construction of remedial legislation that, consistent with the language of the enactment, the interpretation which must be adopted is the one which best serves to advance the remedy and to suppress the mischief contemplated by the legislation. (See also section 10 of the Interpretation Act R.S.O 160 c. 191). Having regard to this principle and to the fact that the language of the section is entirely susceptible of and in agreement with such a meaning, we are impelled to give the section a large and liberal rather than a narrow or restrictive construction."

Thus the Board is disposed to construe the word "sale" liberally, so long as some reasonable basis can be found to hold that the disputed transaction falls within the phrase "... any other manner of disposition."

A transfer need not be a transaction directly between the predecessor and the alleged successor. There can be a "chain" transaction, or sequence of sales with a consequent "flow through" of the "business" and bargaining rights to the ultimate transferee.[14] In Eaton Yale Ltd. (1971) O.L.R.B. Rep. (Oct) 667, the Board traced "the business" and the bargaining rights through a complicated series of transfers incidental to a corporate reorganization and merger of three companies to create a new corporate entity.[15] The interposition of a receiver does not effect the result, so long as "the business" is transferred (i.e. there is continuity or a "flow through" of the business activity or "the business" as a going concern - see infra).

In Hughes Boat Works (1977) O.L.R.B. Rep. (Dec) 815, the predecessor N was in the boat building business. Its principal creditors were a bank, whose debt was secured by a floating charge, and the Ontario Development Corporation which held a debenture secured by N's fixed assets. When N ran into financial difficulties a receiver was appointed who acted for both principal creditors. The Board found that the alleged successor, H, had acquired the business through the receiver, by means of two, interrelated transactions with the principal creditors who, as a result of realizing their security interests, controlled all of the elements of the undertaking (see also infra). Similarly in Marvel Jewelry Ltd. (1975) O.L.R.B. Rep. (Sept) 733, Parnel Foods Ltd. (1971) O.L.R.B. Rep. (Nov) 715, and Field-Price Ltd. (1973) O.L.R.B. Rep. (Oct) 543 the Board traced the business through a receiver to an ultimate successor. In all of these cases the issue remains whether "the business" has been transferred, and the receiver is simply the "manner of disposition".

Despite some earlier uncertainty, it now seems clear that the appointment of a receiver is not in itself a "transfer" or "disposition" of the business, and accordingly a receiver is not a successor employer. In Toronto Dominion Bank and Price-Waterhouse Ltd. (1979) O.L.R.B. Rep. (Jan), a union had alleged that the bank or receiver was a successor employer. In dismissing the application, the Board observed:

> This is the first proceeding in which the Board has been called upon to determine whether a receiver is a successor employer. In previous proceedings involving a receiver, the application was brought by the trade union after the employer had disposed of the business (assets) to a third party; and it was against the third party that the declaration of successorship was sought. In the instant case, the applicant has not waited for the receiver to dispose of the company's business (assets) to a third party. Instead, it has sought a declaration that the receiver or in the alternative the person appointing it i.e. the Bank is a successor employer.
>
> The Board considers that this applicatin has been prematurely brought. In order for a sale of a business within the meaning of Section 55 to occur, it is necessary that there be a disposition from, in this case, the employer that is party to the collective agreement to another person. An examination of the relationship existing between the company and the respondents reveals that this has not yet occurred. What has happened is that a receiver has been appointed to manage the business - so that the Bank which holds a first charge on the assets and undertaking may enforce its security. Although the receiver is carrying on the business for the benefit of the Bank to which it owes a fiduciary duty, its actions are those of the company which retains the legal and equitable ownership of the assets. Under the terms of the debenture constituting the receiver as the agent of the company, the company is "solely responsible for the receiver's acts or defaults and for its remuneration and expenses". In these circumstances, it cannot be said that a disposition within the meaning of Section 55 has occurred.
>
> It should be emphasized that the result of our decision is not that the bargaining rights of the applicant have been lost which was the result in all previous proceedings in which a Section 55 declaration was refused by the Board. As was recognized by counsel for the respondents, the company's obligations both under the Act and the collective agreement were not extinguished by the appointment of the receiver. So long as the business continues to function, those obligations persist. For that reason, the receiver has continued on behalf of the company to honour the collective agreement.

Note that a different result might follow where the receiver is appointed by the Court, for he is then not an agent of the parties, but a principal (See: Montreal Trust Co. v. Abitibi Power and Paper Co. (1944) 3 DLR 505; and Mount Citadel Ltd. (1976) O.L.R.B. Rep. (July) 367.

Another somewhat unusual example of a "transfer" can be found in Gordons Markets a Division of Zehr Mart Ltd. (1978) O.L.R.B. Rep. (July) 631; (application for judicial review dismissed: November 21, 1978).

L, which ran a chain of retail food stores, was bound by a lease with C for certain premises used for that purpose. Z was a subsidiary of L and also ran a retail food chain. Both Z and L were part of the Weston Group. C was unrelated to either Z or L. The evidence indicated a desire to rationalize operations within the corporate family, and accordingly L negotiated with C for a surrender of its lease conditional upon its procuring Z to enter into a new 'foodstore' lease on the same terms (which L guaranteed).

Much of the argument in this case involved a characterization of "the business" and whether there had been a transfer of "L's business" to Z or alternatively Z had merely set up its own parallel business; however, it was also argued that there could not be a "transfer" to Z since there was not direct transaction or disposition between L and Z but rather two separate transactions with a third party (C). The Board emphasized the corporate links between Z and L and the apparent interrelationship of the two transactions and found a "sale". Similarly, in Thunder Bay Ambulance Services Inc. [1978] OLRB Rep. (May) 467 the "transfer" was effected by the revocation of a licence to operate the ambulance service and the issuance of a new licence to the transferee who continued to operate the service using the equipment owned by the Ministry of Health and the same employees as the predecessor. The transferee was, in fact, the manager of the operation when it was carried on under the auspices of the predecessor hospitals.

In the absence of special legislation the successor rights provisions cannot apply to a transfer across constitutional boundaries, or boundaries established by legislation, (ie. a transfer to or from the Crown or a sale of part of a business from a federally regulated entity to a provincially regulated entity). Both the predecessor and the successor must be within the scope of the Labour Relations Act.[17]

"Sale...of a business"

Since the successor rights provisions are triggered by a transfer "of a business", it must be determined whether it is the predecessor's "business" which has been transferred and continued by the successor, or, alternatively, there has merely been a transfer of assets or other incidental elements of the business. The term "business" moreover, is not restricted to purely commercial enterprises, but includes the activities of hospitals, universities, school boards, and other service undertakings to which the Labour Relations Act applies. All of these entities engage in economic activities which generate employment and this in turn may involve the employer-employee/collective bargaining relationships which the Act is designed to regulate. The significance of this statutory focus on the employer-employee relationships will be considered below.

A business is a complex aggregation of a number of elements, some of which will be integral and others merely incidental to the total undertaking. In Raymond Coté [1968] OLRB Rep.(Mar) 1211 the Board commented:

> "The meaning to be attached to the word "business" depends to a great extent on the facts and circumstances in each particular case. It cannot be said that any one facet of an enterprise taken by itself necessarily comprises a business. It has been expressed that a business is "the totality of the undertaking." The physical assets of buildings, tools and equipment used in a business are not necessarily the undertaking per se but are, along with management and operating personnel and their skills, necessary in the operations

> to fulfill the obligations undertaken with a hope of producing a profit to assume its success. The total of these things along with certain intangibles such as good will constitute a business."

The task in successor rights cases is to determine whether a sufficient number of these elements have been transferred, directly or indirectly, from the predecessor to the successor so that it can be reasonably said that there is a transfer "of the business".

The "total undertaking" may be relatively insubstantial, particularly in the case of small businesses or businesses engaged in the supply of services. There may be little more than the accumulated skills (technical and entrepreneurial) of the management and employees. If these are transferred there will be a transfer "of the business". Thus, where several brothers who ran an electrical contracting business decided to divide the assets and go their separate ways, and thereafter each continued to do electrical contracting hiring many of the same employees, the Board found a sale of a business.[18] All of the elements of the predecessor's business could be traced through to the various successors.

In Dellelce Construction, [1972] OLRB Rep (Jan) 60, "D" the alleged predecessor was an incorporated division of a family enterprise which was primarily engaged in the rental of trucks and other equipment to certain large industrial users. D, however, was the "construction arm" of the business, and was engaged in the rental of

construction equipment and the supply of operators to construction contractors. D owned no assets itself but was merely a rental agent for the equipment owned by the parent firm. D did, however, employ its own skilled workforce. As a result of a business re-organization, D was dissolved (or "folded into the parent"), the employees were absorbed by the parent, and the rental activities carried on directly. The Board found a transfer, D's business to the parent.

A similar situation arose in Thunder Bay Ambulance Services Inc. (cited supra). There, the operation of a licenced ambulance service was transferred from two hospitals to a newly incorporated company which continued the service with many of the same employees and management pursuant to a new licence issued by the Ministry of Health. The M.O.H. continued to own all of the vehicles and equipment, and continued to fund the service in the same manner as before. The principal owner and manager of the "new" ambulance service had managed the service when it was attached to the predecessor hospitals, and he performed essentially the same function with the new company. The Board was careful to distinguish between "the predecessor's business and its components", but, having characterized the business as "the operation of an ambulance service," found that there was a continuum of "the business" by the successor. While there was no direct and voluntary transfer from the hospitals to

the new company, the company did acquire exclusive use of the same assets and did acquire and maintain the "human capital" intact. Thus it was found that there was the necessary continuum of the business. The essential element of the business was not the assets or tangible property (which remained the property of the M.O.H.), it was the team of experienced and seasoned employees who, together with their manager were transferred intact to the new business entity.

Complex problems also arise from the fact that the successor rights provisions may be triggered by the transfer of "part of a business". (see Section 55(1)). The language suggests that bargaining rights should continue when something considerably less than "the totality of the undertaking" has been transferred. Presumably the legislature envisaged the preservation of bargaining rights where there is a severance and transfer of a discrete, coherent portion of the economic activities which comprise the totality of "the business". But, as a practical matter a business is a "going concern" - a cohesive integrated whole which cannot be sensibly sub-divided. Nevertheless the Board must give some meaning to the language which is consistent with the legislative intention. Thus the Board has found a transfer of "part of a business" where one of a chain of retail stores has been sold to a competitor,[20] where there is a transfer of the right and means to produce one of the

range of products formerly produced by the business,[21] where there was a transfer of certain milk delivery routes in a particular geographic area,[22] and where there was a transfer of the oil burner installation and service branch of a firm which was primarily engaged in the sale and delivery of fuel oil.[23] Essentially the determination depends upon an analysis of the facts and an appraisal of the character of the business in which the predecessor is engaged. Thus in Kems Masonry [1964] OLRB Rep. (Dec) 470, it was agreed by all of the parties that a small masonry business "does not have good will, and that the essence of the business consists of its equipment and services." Accordingly the transfer of equipment was held to be a transfer of "part of a business" (although the Board also noted that there was a family relationship between the principals of the predecessor and successor, and the owner of the successor was actively involved in the business of the predecessor). In contrast, in Norjohn Contracting Ltd. [1978] OLRB Rep. (May) 438, the Board found the transfer (and subsequent dismantling) of an asphalt emulsion plant between two independent entities was simply a sale of assets.

Similar problems arise when it becomes necessary to distinguish "contracting out" from a "sale of part of a business."

Contracting out involves the transfer of work from A to B. Work or services formerly performed by A's

employees within A's own organization are "contracted out" to B. B uses his own managerial skills, plant, equipment, and "knowhow" to supply to A, for a price, the product, services, facilities, or components formerly produced by A's employees. A, therefore is contracting for the use of B's economic organization in lieu of his own. A is generating a particular demand or market for B's product. If however, B is unable to fulfill A's requirements with his existing plant and equipment and receives from A a transfer of capital, assets, managerial skills, employees or knowhow, then the transaction no longer works like a simple contracting out. A is not making use of B's economic organization, rather A is transferring part of <u>his</u> economic organization to B (and recall that "part of a business" must, in the context of a labour relations statute, mean an economic activity which gives rise to employment). It is to be expected that when A phases out part of its operation there may be certain assets which are now surplus and which can be disposed of on the market; if on the other hand, but for the transfer of such assets or the hiring of surplus employees, B would be unable to fulfill the contract, then there is a strong inference of a transfer of part of A's business - albeit a part which A no longer wishes to operate itself. Essentially the matter is one of characterization: Is the transfer (if any) from A, merely incidental or is it essential to B's ability to produce the goods or services formerly produced by A itself? A simple transfer of work is not enough.[24]

> cases offer a countless variety of factors which might assist the Board in its analysis: among other possibilities the presence or absence of the sale or actual transfer of goodwill, a logo or trademark, customer lists, accounts receivable, existing contracts, inventory, convenants not to compete, covenants to maintain a good name until closing or any other obligations to assist the successor in being able to effectively carry on the business may fruitfully be considered by the Board in deciding whether there is a continuation of the business. Additionally, the Board has found it helpful to look at whether or not a number of the same employees have continued to work for the successor and whether or not they are performing the same skills. The existence or non-existence of a hiatus in production as well as the service or lack of service of the customers of the predecessor have also been given weight. No list of significant considerations, however, could ever be complete; the number of variables with potential relevance is endless. It is of utmost importance to emphasize, however, that none of these possible considerations enjoys an independent life of its own; none will necessarily decide the matter. Each carries significance only to the extent that it aids the Board in deciding whether the nature of the business after the transfer is the same it is was [sic] before, i.e. whether there has been a continuation of the business."

As might be expected given the labour relations focus of the statute the Board has placed special significance on the nature of the work performed before and after the transfer. In Dennis Moran Ltd. [1977] OLRB Rep (Apr) 277 the Board stated:

> "Perhaps the most important factor considered by the Board in section 55 cases is the nature of the work performed. If the work performed subsequent to the transaction is not substantially different from the work performed prior to the transaction that is normally strong evidence that there has been a section 55 disposition."

Rather than looking at the continuity of assets, employees and other factor inputs, one can consider whether there has been a change in the "output", that is, the product or product mix. If there has been such change, the inference is that there has not been a sale "of the business".

In Woodway Structural Components [1971] OLRB Rep. (Nov) 732, the Board found it significant (inter alia) that the alleged successor was primarily engaged in producing a product which had been only a minor aspect of the predecessor's business. Similarly in Canada Cement LaFarge Ltd. [1975] OLRB Rep (Dec) 905 the Board considered (inter alia) the fact that the predecessor had quarried gravel which it used solely in the production of cement, while the alleged successor produced no cement but sold only gravel. The property had the potential for two distinct different businesses and the predecessor and successor had each pursued its own particular business. There had been no transfer.

Dufferin Steel [1976] OLRB Rep (Mar) 81, involved a consideration of both the character of the work and the character of the product. The alleged successor had acquired many of the assets, the employees and the corporate name of the predecessor, but the alleged successor produced a much more highly engineered sophisticated product and the skills of the continued employees had to be upgraded by retraining. The Board found a simple transfer of assets and some employees, the "goodwill" being entirely inapplicable to the production of a product sold in a different market.

In Winiker Industrial Auctioneers Ltd. [1978] OLRB Rep (Jan) 15, on the other hand, the Board emphasized the similarity of the employees, skills, and product.

It might be noted at this point that the character of the business may also have to be considered after the sale since section 55(5) allows the Board to terminate bargaining rights where the character of the business has been altered. In Winco Steak N' Burger Restaurants Limited,[27] a tavern and restaurant was transferred. The Board held that there had been a sale of the business that the decor and menu changes were not sufficient to have effected a change in character within the meaning of section 55(5). The Board stated that a change which would make a business "substantially different" from the business of the predecessor would involve "a fundamental difference affecting the nature of the work requirements and skills involved in the business to the extent that continued representation by the trade union would be inadequate, inappropriate or unreasonable in all the circumstances".

The characterization of "the business" and the "sale" may be influenced by the relationship, if any, between the alleged predecessor and successor. Where there are corporate, personal or family links between the two, the Board is more likely to infer that there has been a continuity of the business despite changes in the corporate vehicle or organization in which its economic activities are carried on. Conversely, clear

evidence of independence may also be indicative, as where the predecessor remains "in business" in active competition with the alleged successor, or the alleged successor must actively solicit the business and customers of the predecessor rather than simpling inheriting them.[28]

In some circumstances a hiatus in production may be significant since it may indicate the death of the business as a going concern. However, there must be a clear break in continuity and one may have to distinguish between the resusitation of an ailing business and the mere transfer of its tangible remains. An extended shutdown makes it more likely that the Board will find a mere transfer of assets, but it is not the fact of a shutdown, or a shutdown for any particular length of time which is determinative. Rather one must ascertain whether the hiatus is long enough for essential attributes of the business (particularly goodwill) to drain away. Thus in Zehrs Markets Ltd. [1974] OLRB Rep (May) 331 the Board stated:

> "The Busy B operation had closed down for approximately 6 or 7 months at the time that the transaction took place. It had effectively ceased its operations to the point where a finding cannot be made that there is some form of continuation of the business. We do agree that a time lag between the opening and closing of a business does not of itself preclude a finding that there has been a continuation of the business. Thus, in certain instances even though one business has closed down and another reopened after an interval, factors

> such as business location which may continue the goodwill or the transfer of personal assets may establish some form of continuity to enable a finding that there has been a sale under the Act."

Similarly in Brantford Concrete Pipe Co. [1966] OLRB Rep. (Dec) 731 a shutdown of six months (inter alia) prompted an inference that the business had ceased to exist and had not been transferred as a going concern. In Red Lion [1969] OLRB Rep (Feb) 1211, on the other hand the beverage rooms and cocktail lounge of the hotel had been closed down for a year although the proprietor continued to operate the other aspects of the business. When a sale of the business took place, the new owner acquired the suspended liquor licence, and subsequently was able to have the licence reinstated and reopen the liquor dispensing aspect of the operation. The Board found that the unions bargaining rights in respect of the beverage rooms etc were preserved.

The Board will be more likely to find that there has been a continuation of a business if the transaction provided for the transfer of goodwill, although the Board will not consider the adequacy of the consideration paid for goodwill, nor does it matter that the transaction did not specifically provide for the transfer of goodwill if goodwill was in fact transferred.[29] The Board has described goodwill as follows:[30]

> "Goodwill is the benefit and advantage of a good name, reputation and connection of a business. It is the attractive force

> which brings in customers. It is the one thing which distinguishes a well established business from a new business at its first start... Goodwill is composed of a variety of elements. It differs in its composition in different trades and on different bases in the same trade. One element may preponderate here and another there... Other factors to be considered are good relations with employees, favourable commercial contracts, franchises, good financial relationships and finally good management."

In L. & M. Food Market, [1965] OLRB Rep. Sept. 440, the Board stated that:

> "The presence of clauses in the transaction providing for the payment of consideration for goodwill and restricting Steinberg's from carrying on a competing business would have added to the union's argument that the transaction constitutes the sale of a business. In our opinion, however, the bare fact of the omission of such clauses, in the circumstances of this case, is of itself of little or no probative value in reaching a conclusion as to character of the transaction. Plainly, these clauses could have been omitted for a number of reasons without derogating from the character of the transaction as the sale of a business."

Thus, while the specific provision for the transfer of goodwill may lead to an inference of a "sale of the business", the absence of such provision simply raises a question of fact concerning whether there was a transfer. Of course, as in Kem's Masonry (supra) "the business" may have no goodwill to transfer.

As should now be apparent, each case turns upon its own particular facts and it serves little purpose to multiply

examples. Nevertheless it may be useful to reiterate the "classic case" to which section 55 was originally directed. In Beaver Engineering (cited supra) for example, the Board stated:

> "The case before us is a classic situation where a person is employed by one company and then his employment terminated and he is placed with another company. To that employee the companies appear the same. Having been initially involved with Bennett & Wright Limited the employee is placed in the position where there are striking similarities between his former employment and his present employment. His supervisors are the same, many of his fellow employees are the same, the products of the company are the same, the machinery and equipment are the same and the majority of the customers are also the same. It is to the employee more than a mere coincidence and it is to us also more than a mere coincidence."

The closer the resemblance to the "classic" situation, the more likely it is that the Board will find a "sale of a business".

"Intermingling" the "Like Bargaining Unit" and Related Problems

The sale of a business involves a statutory transfer of the union's right to bargain on behalf of those employees of the predecessor who have been retained in the business, and a transfer of collective agreement rights insofar as they apply to those employees. (the employees "right to be retained will be discussed infra) It is important to note that the bargaining rights and collective agreement provisions do not extend to the previously unrepresented employees who may fall within the scope of the bargaining unit description in such agreement.[31] After a sale, the Board must determine whether this island of collective bargaining should be maintained in its existing form within the context of the successor's operation. Even in the absence of intermingling there may be a conflict of bargaining rights (as for example where the successor is already bound by a collective agreement with another union which by its terms designates that union as the bargaining agent for all of his employees). If by reason of the operation of section 55(2) an employer becomes bound by a collective agreement which may by its terms purport to bind his previously unorganized employees, or which raises a conflict with existing bargaining rights or agreements or which raises some question as to the meaning of "the like unit" (ie the dimensions of "the island"), an application to the Board can be made under section 55(4) for clarification of the successor union's status. Such application may be made by any interested party and commonly is made when a question arises as to the extent of the union's bargaining rights.

The Board has consistently held that great weight will be given to preserving the existing bargaining structure. The island of collective bargaining will be considered prima facie

appropriate and will be maintained if there is a reasonable basis for preserving its identity. In making its determination the Board will not apply the same criteria as would be applied if the union had sought certification for the subject employees. Thus in Loblaws Groceterias Co. Ltd. 1973 OLRB Rep (Jan.) 73 the Board preserved a union's bargaining rights in a single retail food store in Windsor and declined to redefine the bargaining unit to include all stores in the municipal area even though that is what it would have done had the union applied de novo for certification for that single store.

In City of Peterborough [1979] OLRB Rep (Feb.) the franchisee who ran the city bus service failed to renew the franchise agreement and the city decided to run the service directly. A transfer was effected which the Board found to be a "sale" of a business and, as a result, the drivers, mechanics, etc. became employees of the city. There was no actual intermingling with other city employees, but there was an apparent conflict of bargaining rights. The bargaining agent for the drivers was the A.T.U., but CUPE already had an agreement with the City which purported to apply to all city employees. The Board treated the matter under section 55(4) and in preserving the A.T.U.'s position in the transit operation (only) remarked:

> The consistent point of departure in the decisions of the Board in applications under section 55 of the Act is a recognition that the primary purpose of the section is the preservation of employees' bargaining rights upon the transfer of a business. The section protects employees of a transferred undertaking against automatically losing their union or seeing their bargaining rights transferred to a bargaining agent not of their choosing. Thus while the remedial scope of the section allows the Board to engage in an assessment of what is the appropriate bargaining unit the criteria to be applied are not identical to those which obtain in an application for certification of previously unrepresented employees. While the Board may have

> regard to all of the criteria that apply to that determination in certification proceedings it must also, having regard to the purpose of section 55, seek to balance the interests of the employees of the transferred undertaking and their union with the interests of both the employer purchasing the undertaking as well as the interests of that employer's existing employees and their union. In other words, in the fashioning or amending of bargaining units under section 55 of the Act the Board must give effect to existing bargaining rights to the extent that those rights can be reasonably accommodated within the new employer's administrative structures. (Oshawa Wholesale Ltd. [1965] OLRB Rep. Feb. 504; The Corp. of the City of Kitchener [1973] OLRB Rep. June 306; Yarntex Perth, Division of Yarntex Corporation Ltd. [1975] OLRB Rep. 137).
>
> Of particular concern in the determination of bargaining units under section 55 of The Labour Relations Act is that existing bargaining structures not lightly be interfered with.

Section 55 preserves the rights of unionized employees in the event of a sale, however it does not operate in situations where the predecessor is not unionized, and there are, therefore, no bargaining rights to preserve. For example, in Kerr Progress Printing Ltd. [1975] OLRB Rep. (July) 591, J.K. a unionized firm bought the business of P. which was not unionized. J.K. intermingled the employees of P. with those in its own composing room and since its own unionized employees were a minority in the composing room, sought a representation vote under section 55(6) (the intermingling section). The Board held that section 55 did not apply at all to this situation.

Where the sale of a business is associated with a geographic transfer of employees from the predecessor's location to that of the successor, the effects of the geographic transfer must be analyzed separately. It would seem that a trade union whose bargaining rights are geographically (or otherwise) restricted, will not find itself in a better position simply because the geographic move has been combined with a sale. If bargaining rights are geographically rooted, the transfer of employees to another location as a result of a sale will not lead

to a transfer of bargaining rights to the new location, nor will the inclusion of the employees in another union's bargaining unit be considered an intermingling; rather it will be a mere "accretion" to the other union's bargaining unit.[32] A different result might follow where the scope clause in the predecessor's collective agreement was broad enough to cover the employees at the new location if the predecessor itself had moved his business there. In such circumstances the successor would be bound by the agreement, section 55(3)(4) would apply, and if the employees were intermingled a vote could be held.[33] The operative principle is the distinction between preserving or extending bargaining rights. If a collective agreement limits bargaining rights by craft or geographic location or otherwise, the successor can, at most, be bound by that agreement which is subject to its own stated limitations. A similar qualification would apply in the case of section 1(4) (see comments of the Board in Mina Mart cited supra).

The intermingling contemplated by section 55(6) can be actual or in the case of the amalgamation of municipal entities, "deemed" by section 55(11). Except in situations where there is a deemed intermingling, the Board will only entertain an application for relief under section 55(6) where the intermingling has actually taken place. However a lapse of time is not a bar to an application, and an employer is entitled to wait until the intermingling has actually occurred before seeking relief under section 55(6) - even if intermingling occurs several months after the actual sale of the business.[34] Relief may not be available if there is merely a "token intermingling",[35] and even though there is a deemed intermingling under section 55(11), where there is no actual intermingling the Board may decline to order a representation vote.[36] The Board's concern to preserve

existing bargaining rights is a factor influencing the exercise of the Board's discretion in intermingling situations just as it is in determining the "like unit" under section 55(4), however this consideration is less important in municipal amalgamations where the deemed intermingling provisions appear to reflect a legislative intention that there should be a restructuring and rationalization of bargaining structures.

The Board has declined to order a representation vote where only one union was involved, and in at least one case where the same union was the bargaining agent for all of the affected employees the Board suggested that the conflicting unit descriptions contained in the outstanding (and by that time expired) collective agreements should be resolved at the bargaining table.[37] Where the parties have purported to restructure the bargaining unit by a joint agreement which has been embodied in a new collective agreement, it may be too late to come before the Board and seek variation under section 55(6). In such circumstances the matter is essentially one of interpretation of the new agreement and the Board may defer to arbitration.[38]

Where as a result of the intermingling the union, or a particular union clearly represents a substantial majority of the employees in the restructured unit, the Board may decline to hold a representation vote and can proceed directly to a declaration of successor status or termination of bargaining rights.[39]

Some Mechanics

Successor rights issues arise before the Board in a variety of ways, most commonly under section 55 itself: where the pruchaser intermingles the vendor's employees with his own (55(6)); or where there is a question concerning the extent to which the union's bargaining rights have been preserved (55(4)); or there is an allegation that there is a conflict with the bargaining rights already held by a union which represents some or all of the successor's employees (55(4)); or the successor claims that it has so altered the character of the business that the union's bargaining rights should be terminated (55(5)). In addition section 55 may come into play where the successor refuses to recognize the collective agreement and consequently refuses to submit to its arbitration provisions, or the successor refuses to meet and bargain with a union which has given a timely notice to bargain with a view to concluding a new collective agreement. In these circumstances the union may ask the Minister of Labour to appoint an arbitrator or conciliation officer as the case may be, and the Minister, will refer the question of his authority to appoint to the Labour Relations Board pursuant to section 96 of the Act. The Minister has the power to appoint <u>if</u> there has been a sale of the business and the union retains bargaining rights for the subject employees and it is entitled to

and has given a timely notice to bargain. Thus, a reference under section 96 can raise and resolve an outstanding successor rights issue.

On a reference under section 96, the Board is entitled to exercise all the powers available to it under section 55, and since its opinion is advisory only, it is not subject to judicial review. In any event, in view of sections 55(12), 95, and 97 of the Act, it is doubtful whether any Board determination of successor status could be subject to judicial review so long as it has "asked itself the right question" and there has been no denial of natural justice.[40]

Where there is no collective agreement in operation at the time of the sale, bargaining rights are continued and the union is permitted a reasonable period of time following the sale to give the successor employer notice to bargain. During this period a certification or termination application would be dismissed and, since the giving of notice has the same effect as a certification (55(10)), a subsequent certification or termination application would be barred.[41] While the successor rights issue is pending before the Board, the successor employer is not required to bargain until the Board has determined the existence and extent of the union's bargaining rights.[42] Notice of a union's desire to continue the bargaining relationship will, however, trigger the section 70 "freeze".[43] Section 70 preserves the terms and conditions of employment as well as the rights,

duties and privileges of the union,[44] the employer, and the employees, pending the termination of the union's bargaining rights, the signing of a new collective agreement or the accrual of the right to strike or lockout in accordance with sections 63(2) and 70(1).[45]

In an application under section 55, the legal burden of proof remains with the party asserting that there has been a sale, even though the respondent employer is required (by 55(12)) to adduce the facts within its knowledge relevant to the application.[46] As a practical matter the allocation of the legal burden of proof is largely irrelevant, because the respondent is required to come forward and adduce evidence. In these circumstances it is usually possible to resolve the issues without any reference to the legal burden of proof.[47]

Where there is a relationship (corporate or otherwise) between the vendor and purchaser, the Board has been disposed to infer a sale if there is the slightest evidence of such transaction, and the purchaser may be required to rebut this inference.[48] Apart altogether from the respondent's "duty to adduce", it is open to the applicant to subpoena both records, and all principals, officers, shareholders or other persons who might have knowledge of the transaction. It has been recognized that:

> "This is a cumbersome procedure, but if necessary the Board will grant subpoenas in order that all the facts may properly be adduced. Undoubtedly such procedure would to some extent, turn into a fishing expedition, but absent the usual pre-trial procedures, it may be necessary that in cases of this sort, allowances be made for such a procedure." [49]

The Board has consistently sought to avoid encumbering its proceedings, by encouraging counsel to admit to as much information as possible prior to the hearing. Moreover, in Beaver Engineering Ltd. [1973] OLRB Rep. (Jan) 57, the Board pointedly noted that a failure to produce relevant witnesses or documents might prompt it to draw the inference that the unproduced evidence would be contrary to the respondent's case or at least would not support it. The Board remarked that "since the circumstances surrounding the transaction were entirely within the knowledge of the employer(s) they cannot complain if the inferences drawn from the established facts are not favourable to them." [50]

The duty to adduce, without an actual shift in the legal burden of proof, creates a procedural curiosity which the Board discussed in Canada Cement LaFarge Ltd. [1977] OLRB Rep (Jan) 5. It was determined that the respondent's obligation could be analogized to that of a party on an examination for discovery, and that the

Board itself would not conduct its own enquiry. It was held that the respondent must give "evidence-in-chief" and is thereafter subject to crossexamination. The respondent's witnesses must acquaint themselves with facts not within their personal knowledge but which might be within the knowledge of other officers or servants of the corporation; and must diligently search through and consider the documents within their own possession or to which they are lawfully entitled. A witness may be required to inform himself on matters which he has been unable to answer, and the Board may direct a witness to supplement an insufficient response - so long as the evidence sought is relevant and material. However, an applicant must seek such direction immediately following its own crossexamination, and if it does not do so, may be taken to have waived its right to object to any insufficiency in the respondent's evidence. Of course, the applicant remains entitled to call its own evidence.

Upon the sale of a business, a successor employer automatically becomes bound by the predecessor's agreement until the Board otherwise declares. The successor is bound to apply the terms of the agreement to the predecessor's employees until such time as the union's bargaining rights are terminated or varied. Neither a declaration terminating the union's bargaining rights because it has lost a representation vote, nor a declaration that there has been a substantial change in the character of the business, have

retrospective affect. Neither wipes out the contractual rights that the transferred employees enjoyed prior to such declaration. The successor remains bound by the agreements and is subject to the grievance-arbitration process until the declaration is made.[51]

The section 55(2) "flow through" of the collective agreement operates immediately upon the sale of the business, however there was some doubt whether the relief available to an employer who changes the character of the business had to be sought within sixty days of the "sale", or could be sought within sixty days of the date that he employs employers in the unit defined in the agreement. The better view is that the sixty day time limit in section 55(5) runs from the date of the sale, but that a failure to comply therewith is a technical irregularity only, which need not necessarily result in the dismissal of the employer's application.[52]

It is obvious that a prospective transferee should be careful to ascertain whether there are any outstanding bargaining rights, certificates, collective agreements, arbitration awards or grievances in process. This is best done by specific requisition,however,pursuant to section 74 of the Act, the parties to a collective agreement are each required to file a copy with the Ministry of Labour, and the Board has records of certificates issued.

Unfair Labour Practice Considerations

For the most part, successor rights applications involve a determination of the labour relations consequences of bona fide business transactions. Occasionally however, there will be associated with business sales or reorganizations, conduct which is specifically designed to get rid of the union or its supporters, and which, in consequence, is illegal. Such conduct usually involves a breach of sections 56, 58 or 61 of the Act. The essential ingredient in all of these sections is "anti-union animus." Otherwise bona fide business conduct may be illegal if it is motivated in whole or in part by anti-union considerations, and anti-union animus need not be the only or even principal consideration.[53] As a result of section 79 (4a) of the Act, the burden of proving there was no improper motive may lie with the respondent employer.

The Board has held that it is a breach of the Act for a successor to refuse to hire the predecessors employees because they supported a union,[54] or in order to weaken the "link" with the predecessor and thus undermine the employees rights under section 55.[55] Similarly it is illegal to arrange for the supply of employees through a related company where this arrangement is merely a scheme to mask an illegal discharge of union supporters.[56] While an employer is entitled to lay off employees for proper business reasons, selective lay off of union supporters or the failure to recall union members will constitute an unfair labour practice.[57] All of the participants in these illegal schemes

may be liable in proceedings before the Board, and in addition, may be subject to quasi-criminal prosecution for a breach of the Act.[58] In Sun Parlour Greenhouse [1974] OLRB Rep.(Jan) 94, an application for certification prompted a company to close its office, discharge its employees, and transfer its business to another company. On the evidence the Board was satisfied that both firms had participated in a breach of section 58 of the Act. It was unnecessary to consider the application of section 1 (4).

In Intermountain Industries Ltd. [1975] 1 CLRB 257, the B.C. Labour Relations Board found an unfair labour practice where a company decided to sell its business in order to avoid the effect of a related employer declaration. Damages were assessed against the predecessor. In Academy of Medicine [1977] OLRB Rep. (Dec) 783, the Board considered the case of an employer who had warned his employees that if they sought to join a trade union and bargain collectively he would shut down the part of the operation in which they worked and terminate their employment - a threat which was in fact carried out. On the unusual facts of that case the Board found that the discontinuance of part of the employers operation constituted an unfair labour practice.[59] Similarly a geographic move may, in special circumstances, constitute an illegal practice.[60] Finally, an intentional misrepresentation concerning an employer's intention to move its operation

may be a breach of the statutory duty to bargain in good faith, if, as a result of such misrepresentation the union is induced to abandon contract language which would preserve its position in the event of a move.[61]

The foregoing is premised on the assumption that one or more employers or their agents actively participated in illegal conduct. There does not appear to be any Canadian authority which suggests that the "sins" of the predecessor can "flow through" to the successor unless the successor has itself been involved in the anti-union scheme.[62]

Some Unanswered Questions

The successor rights provisions are of relatively recent origin and, as might be expected, a number of issues remain unresolved or unclear. Many of these involve the rights and obligations of parties under the continued collective agreement - a matter which must initially be determined at arbitration and ultimately by the courts on judicial review. Unfortunately, there is little arbitral or judicial guidance.

A principal concern of the successor may be the extent to which he is required to hire the employees of the predecessor. The British Columbia Labour Relations Board has suggested[63] that it is "implicit" in the legislative scheme that:

> "A successor employer must continue to employ those employees whose jobs survive a succession under the Code, notwithstanding its opinion as to their suitability for continued employment. In other words, the Code should not be interpreted so as to give successor employers a licence to weed out "undesirable employees" ... any discontinuance of employment must be for a legitimate business reason. That is, it must be for "just cause"."

On the other hand, The Ontario Court of Appeal has suggested that the collective agreement establishes the terms and conditions of employment but does not establish a particular employer-employee relationship until there is a specific concensus reached between the employee and employer at the moment of hiring.[64] Since the Labour Relations Act only provides for a flow through of the agreement, this approach might suggest that the successor has a discretion whether to hire the predecessor's employees, and until he does so, the agreement does not apply to them. The better view, it is respectfully submitted, is that at the moment of "sale" the successor becomes bound by the collective agreement, and becomes the employer of those employees then engaged in the transferred business activity. Thereafter he may terminate their employment for cause, subject to any restrictions in the agreement.[65] Unless this view is accepted the collective agreement rights preserved by section 55(2) would be entirely illusory insofar as they apply to a particular group of employees. Nevertheless, the matter is not free from doubt. Moreover the Supreme Court of Canada has recently held that, regardless of common law notions, an employer and employee may be bound by obligations arising

from the collective agreement even though no common law relationship has been established.[66]

Another problem arises from the language of section 55(2) itself which provides that the successor "is...bound by the collective agreement as if he had been a party thereto." Is the successor bound only from the date of the sale or does be become liable for claims which might have arisen prior to the sale as if he had been a party to the agreement ab initio? Suppose, prior to the sale, an employee has been unjustly discharged contrary to the agreement. Is his remedy against the predecessor or successor or both; and can such remedy be sought in a single proceeding? Can the successor be held liable for damages arising from the predecessor's breach? There is no clear answer to any of these questions, yet they are by no means "academic."

The curious effect of section 55 can be illustrated by reference to Re Silverwood Dairies (1976) 12 LAC (2d) 225 (Weatherill). In that case the predecessor, Silverwood sold its "home service dept." to a successor who continued to employ the employees formerly employed in the department. Some of the employees filed grievances against Silverwood's alleging that with respect to it they had been laid off and were entitled to exercise their seniority rights under the Silverwood agreement (which now bound both Silverwood and the successor) in order to bid for jobs in other Silverwood departments. In

upholding their claim, the majority of the board of arbitration stated:

> " While it would be our view that s.55 of the Labour Relations Act applies with respect to the sale of the home service business, we do not consider that the effect of s.55 is such as to deprive employees working in the business or part of the business which is sold from exercising rights under the collective agreement as against the original employer. In the instant case, when Silverwoods ceased to operate the home service department, employees therein were in effect laid off by Silverwoods. They were then, in our view, entitled to exercise seniority rights pursuant to the collective agreement to which Silverwoods was a party."

Thus, an employee may be able to exercise rights under the agreement against both employer parties.[67]

FOOTNOTES

1. Goldenberg, H.C.; Report of the Royal Commission on Labour Management Relations in the Construction Industry Queen's Printer, Toronto 1962 p.44.

2. ibid p.45

3. Sun Parlour Greenhouse Growers' Co-op Ltd. [1972] OLRB Rep (Jan) 94; Foundation-Janin [1972] OLRB Rep. (Feb) 137.

4. See for example Canac Shock Absorbers [1973] OLRB Rep (Oct) 508; DelZotto Enterprises Ltd. [1974] OLRB Rep. (Aug) 533; and J. A. Wotherspoon Ltd. [1973] OLRB Rep. (May) 53 were the criteria where satisfied and Ralph Ford Electrical Contracting [1974] OLRB Rep. (June) 388 where they were not.

5. Genaire Ltd. (1958) 14 DLR (2d) 201, 58 CLLC 15388 (O.H.C.); aff'd (1959) 18 DLR (2d) 588 (O.C.A.); Cmac Shock Absorbers supra.

6. Industrial Mine Installations Ltd. [1972] OLRB Rep (Dec) 1029; MacDonald Consolidated Ltd. [1973] OLRB Rep (Jan) 3;

   E. J. Wright Ltd. [1973] OLRB Rep (Mar) 176;

   H. Allaire & Sons Ltd. [1974] OLRB Rep (July) 457;

   Inducon Const. of Can. Ltd. [1975] OLRB Rep (Apr) 399;

   Zaph Construction Ltd. [1977] OLRB Rep (NN) 741.

7. Crown Cork & Seal [1978] OLRB Rep (Sept) 809.

8. Ellwall & Sons Const. Ltd. [1978] OLRB Rep (June) 535

   Superior Plumbing [1978] OLRB Rep Oct.

9. The facts in Farquhar should be considered together with those of Elmont Construction Ltd. [1974] OLRB Rep (June) 342.

10. Section 55(2)

11. Section 55(5)

12. Section 55(6)

13. Alliance Dairy Ltd. [1966] OLRB Rep (Aug) 336;

Westeel Products [1966] OLRB Rep (Dec) 718;

Regional Munic. of Waterloo [1973] OLRB Rep (June) 302;

City of Mississauga [1974] OLRB Rep (Mar) 184.

14. Culverhouse Foods Ltd. [1976] OLRB Rep (July) 691

Trenton Riverside Dairy Products [1964] OLRB Rep (May) 72.

15. See also: Belton Quinn Lumber Ltd. [1965] OLRB Rep (Aug) 373; Westeel-Rosco Ltd. [1966] OLRB Rep (Dec) 718.

16. A receiver in these circumstances might have to consider the remarks of Laskin C.J.C. in McGavin Toastmaster Ltd. (1975) CLLC 14277 (S.C.C.) concerning the application of common law doctrines (especially repudiation) to collective agreements. See also: Wescana Inn Ltd. (1977) 82 DLR(3d) 368.

17. Durham Transport Inc. [1978] OLRB Rep (Sept) 818. Such legislation exists in respect of transfers to and from the Crown in right of Ontario. See: The Successor Rights (Crown Transfers) Act s.o. 1977 ch.30.

18. Base Electric [1978] OLRB Rep (Feb) 140.

19. British American Bank Note Co.Ltd. [1978] OLRB Rep (Feb.)

20. for example Super City Discount Foods [1970] OLRB Rep (Apr) 119; Loblaws Groceterias Ltd. [1973] OLRB Rep (Jan) 73. See also Winco Steak & Burger etc.Ltd. [1974] OLRB Rep (Nov) 789.

21. Canac Shock Absorbers supra footnote 4.

22. Borden Co.Ltd. [1970] OLRB Rep (Jan) 1244.

23. Automatic Fuels Ltd. [1972] OLRB Rep (May) 515.

24. British American Bank Note Co.Ltd. [1979] OLRB Rep (Feb); see also YMCA [1968] OLRB Rep (July) 407; Canteen of Canada [1967] OLRB Rep (Apr) 94.

See also: Gibsco Transport Ltd. [1965] OLRB Rep(May) 141, Super Sanitation Services Ltd. [1968] OLRB Rep(July) 375, Clark Dairy Ltd. [1970] OLRB Rep(Aug)601, RWS Delivery Services Ltd.[1972] OLRB Rep(June) 632. But now consider section 1(4).

25. Denis Moran Ltd. [1977] OLRB Rep(Apr) 277.

26. British American Bank Note Co. Ltd. supra footnote 25; see also Culverhouse Foods Ltd. cited supra footnote 14.

27. cited supra footnote 20.

28. See for example: Zehrs Markets [1975] OLRB Rep (Jan) 48; Gordon's Markets [1978] OLRB Rep (Dec); Mortlock Construction [1978] OLRB Rep (July) 662; Sunnybrook Food Mkt [1974] OLRB Rep (Jan) 47; Aircraft Metal Specialists [1970] OLRB Rep (Jan) 15. Note also the possible application of section 1(4).

29. Culverhouse Foods cited supra footnote 14; Winco Steak & Burger cited supra footnote 20; Denis Moran[1977] OLRB Rep (Apr) 237; Dutch Boy Food Mkt 65 CLLC 775; Dufferin Steel [1976] OLRB rep (Mar) 81.

30. Dufferin Steel cited supra footnote 29.

31. Bryant Press [1972] OLRB Rep (Apr) 301. Nevertheless, to avoid the possibility of problems an employer may be required to move expeditiously to obtain a Board determination.

32. Mountain View Dairy [1967] OLRB Rep (Feb) 911. See also: Canada Valve [1967] OLRB Rep (June) 297 and Amalgamated Electric [1963] OLRB Rep (Oct) 403.

33. Canadian Trailmobile [1969] OLRB Rep (Jan) 1057.

34. Bryant Press cited supra footnote 31.

35. Oshawa Wholesale Ltd. [1965] OLRB Rep(Feb) 584; Lake of the Woods District Hospital [1968] OLRB Rep (July) 394. But see: Pinecrest Products Ltd. [1972] OLRB Rep (Nov) 974.

36. City of Mississauga [1974] OLRB Rep(Feb) 98.

37. Town of Iroquois Falls [1969] OLRB Rep (Feb) 1208; Toronto Star [1972] OLRB Rep (Dec) 995.

38. Canadian General Electric [1978] OLRB Rep(June) 501.

39. For example: Alliance Dairy [1966] OLRB Rep(Aug) 366; Westeel Rosco [1966] OLRB Rep(Dec) 718; Waterloo & Cambridge [1973] OLRB Rep (June) 302.

40. R. ex. rel. Amalgamated Meatcutters etc.v. Kitchener Food Market Ltd. et al (1966) 54 DLR (2d) 219; 66 CLLC parag. 14136 (OCA).

41. Firestone Steel Products Ltd. [1968] OLRB Rep (Oct) 685; Arnold Steele & Assoc. Ltd. [1968] OLRB Rep (Oct) 725; Wm. Finkle Machine Ltd. [1969] OLRB Rep (Dec) 911; Metro Toronto Library Bd. [1969] OLRB Rep(July) 524; I.T.T. Canada Ltd. [1970] OLRB Rep.(June) 330; Irving Charles Supermarket Ltd. [1965] OLRB Rep.(Sept) 406.

42. section 55(9)

43. section 55(3) and section 70

44. The terms and conditions of employment will usually be set out in the collective agreement itself, but the term "privilege" is one of broad signification and encompasses all other benefits to which an employee has been or can reasonably expect to be entitled even though such benefits are not "legal rights". The purpose of section 70 is to establish a clear base point from which bargaining can proceed. See for example: A.N. Shaw Restoration Ltd. [1978] OLRB Rep (June) 479 (employer privilege established when union permits persistent breach of agreement); Bell Shirt Co.Ltd. [1978] OLRB Rep(Apr) 373 (failure to follow pre-existing policy re sick leave benefits); Scarborough Centenary Hospital Assoc. [1978] OLRB Rep (Sept) 679 (withdrawal of parking privileges); Spar Aerospace Ltd. [1978] OLRB Rep (Sept) 859 (failure to follow established practice respecting merit adjustments and assessment) See also: Wellesley Hospital [1967] OLRB Rep(July)364; Beaver Electronics [1974] OLRB Rep(Mar) 120; and Canron [1976] OLRB Rep (Aug) 436. It is apparent that the freeze catches much more than the parties' legal rights as evidenced by the contracts or collective agreement, however it does not operate to suspend management's right to run the business; rather the section preserves "business as usual". Business as usual includes the right to hire, fire, lay off, etc., but it also includes the privileges which employees are accustomed to receive.

45. Difficult, technical and largely unresolved issues may arise if the sale takes place after the collective agreement has expired, since in such circumstances only the bargaining rights flow through although the section to freeze may be triggered by the giving of notice. It is possible that a successor may be entitled, bona fide to alter conditions prior to such notice although semble there may be "constructive notice" if the successor is aware of the union's

45. cont'd...

desire to continue bargaining rights. See Owen Sound General and Marine Hospital [1978] OLRB Rep (Aug) 759. Quaere the result where a successor, without knowledge of the union bona fide alters working conditions or bona fide declines to hire the predecessor's employees and there is no collective agreement or notice to trigger the section 70 freeze?
As to the time that the "sale" takes place see: Owen Sound General and Marine Hospital supra.
Note that a section 44(2) "extension agreement" has been held to flow through following a sale see: Zehrs Markets [1973] OLRB Rep(May) 225.
Furthermore it appears that a strike must be terminated upon the sale of a business and the union must commence negotiations with the new employer See: Canac Shock Absorbers [1973] OLRB Rep(Oct) 508 where the employer sought a successor rights declaration and the union sought section 1(4) relief so that its ongoing strike would remain timely.

46. Woodway Structural Components [1971] OLRB Rep (Aug) 545; Beaver Engineering Ltd. [1973] OLRB Rep (Jan) 57; Canada Cement LaFarge [1975] OLRB Rep(Jan) 5; Zehrs Markets Ltd. [1975] OLRB Rep. (Jan) 48.

47. Marvel Jewelry Ltd. et al [1975] OLRB Rep (Sept) 733.

48. Zehrs Markets Ltd. supra footnote 8.

49. Beaver Engineering Ltd. supra footnote 8.

50. ibid; see also Murray v. Saskatoon (1952) 2 DLR 499 at 505 and Busuttil v Diamond T. Trucks(Toronto) Ltd. et al. (1969) 2 DLR(3d) 167 (O.C.A.).

51. Bryant Press # 1 [1972] OLRB Rep(Mar) 187
Man of Aran [1974] OLRB Rep(Feb) 87.

52. See: Man of Aran [1973] 2 OR(2d) 54 (Ont.Div.Ct.); section 103; and Avondale Dairy [1971] OLRB Rep (Dec) 782;

53. Bushnell Communications Ltd. et al. (1973) I O.R.(2d) 442 (O.H.C.); aff'd (1974) 4 O.R.(2d) 288 (O.C.A.)

54. Jimmy'z II [1977] OLRB Rep (Sept) 572.

55. Gordons Markets [1978] OLRB Rep(July) 630.
In this case it was admitted that the successor had not hired the employees because it was concerned that if it did so, they might be successful in a section 55 application.

56. Culverhouse Foods Inc. [1977] OLRB Rep (Jan) 16.

57. Commodore Homes [1971] OLRB Rep (Aug) 468.
Coronet Furniture Manuf.Co. [1973] OLRB Rep(Dec) 622.

58. See: sections 85-90 of The Act.

59. The evidence was clear that there was no economic rationale for the closure and none was seriously advanced. The Board noted that a number of statutes restrict the right of an enterprise to "go out of business" or dissolve where such action is a scheme to defeat creditors or avoid statutory obligations.

60. Humpty Dumpty Foods Ltd. [1977] OLRB Rep (July) 401.

See also: Custom Aggregates [1978] OLRB Rep (Mar) 215, where an employer artificially increased the number of employees in an effort to "pad the list" with voters who would vote against the union. In both of these cases there was clear evidence of a "scheme" to defeat bargaining rights.

61. Inglis Ltd. [1977] OLRB Rep(Mar) 128.

62. However see: Golden State Bottling Company Inc. et al v. N.L.R.B. 72 LC 1973-74 (U.S.S.C.) where the American Supreme Court suggests that a successor may be required to remedy the unfair practices of a predecessor. And see section 1(2) of The Act which preserves the employee status of an illegally discharged employee.

63. Re Pruden and Assessment Authority of B.C. [1976] 2 CLRB Rep 138 rev'd (1976) 69 DLR (3d) 713 (BCSC).

64. Re Telegram Publishing Co.Ltd. et al (1976) 11 O.R. (2d) 740.

65. Note that as regards the predecessor a termination of employment because there is no work available may not be a "discharge for cause" or justifiable under the collective agreement, although the predecessor may be entitled to layoff surplus employees if the agreement includes layoff provisions. A "laid off" employee, ceteris paribus, remains an employee.

See for example: Canadian Breweries Transport Ltd. (1958) 8 LAC 263 (Laskin); Ajax Hydro Electric Power Comm. (1963) 13 L.A.C. 396 (Kimber).

66. See: Int'l Longshoreman's Assoc. Local 273 et al v Maritime Employers Assoc. et al 78 CLLC parag 14171 (S.C.C.); Blouin Drywall Contractors Ltd. v United Brotherhood of Carpenters and Joiners etc (1975) 57 DLR (3d) 199, 75 CLLC parag 14295.

67. See also: Woodbridge Hotel (1976) 13 LAC (2d) 96; Man of Aran Ltd.(1974) 16 LAC (2d) 238 (Quaere: the result in Woodbridge in the absence of the successor's signing a collective agreement which by its terms had retroactive effect).

Interpretation

55.—(1) In this section,

(*a*) "business" includes a part or parts thereof;

(*b*) "sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings.

Successor employer

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application. R.S.O. 1970, c. 232, s. 55 (1, 2).

Idem

(3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 13 or 45, sells his business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 13 or 45, as the case requires. 1975, c. 76, s. 15 (1).

Powers of Board

(4) Where a business was sold to a person and a trade union or council of trade unions was the bargaining agent of any of the employees in such business or a trade union or council of trade unions is the bargaining agent of the employees in any business carried on by the person to whom the business was sold, and,

(*a*) any question arises as to what constitutes the like bargaining unit referred to in subsection 3; or

(*b*) any person, trade union or council of trade unions claims that, by virtue of the operation of subsection 2 or 3, a conflict exists between the bargaining

rights of the trade union or council of trade unions that represented the employees of the predecessor employer and the trade union or council of trade unions that represents the employees of the person to whom the business was sold,

the Board may, upon the application of any person, trade union or council of trade unions concerned,

(*c*) define the composition of the like bargaining unit referred to in subsection 3 with such modification, if any, as the Board considers necessary; and

(*d*) amend, to such extent as the Board considers necessary, any bargaining unit in any certificate issued to any trade union or any bargaining unit defined in any collective agreement.

Idem

(5) The Board may, upon the application of any person, trade union or council of trade unions concerned, made within sixty days after the successor employer referred to in subsection 2 becomes bound by the collective agreement, or within sixty days after the trade union or council of trade unions has given a notice under subsection 3, terminate the bargaining rights of the trade union or council of trade unions bound by the collective agreement or that has given notice, as the case may be, if, in the opinion of the Board, the person to whom the business was sold has changed its character so that it is substantially different from the business of the predecessor employer.

Idem

(6) Notwithstanding subsections 2 and 3, where a business was sold to a person who carries on one or more other businesses and a trade union or council of trade unions is the bargaining agent of the employees in any of the businesses and such person intermingles the employees of one of the businesses with those of another of the businesses, the Board may, upon the application of any person, trade union or council of trade unions concerned,

(*a*) declare that the person to whom the business was sold is no longer bound by the collective agreement referred to in subsection 2;

(*b*) determine whether the employees concerned constitute one or more appropriate bargaining units;

(*c*) declare which trade union, trade unions or council of trade unions, if any, shall be the bargaining agent or agents for the employees in such unit or units; and

(*d*) amend, to such extent as the Board considers necessary, any certificate issued to any trade union or council of trade unions or any bargaining unit defined in any collective agreement.

Notice to bargain

(7) Where a trade union or council of trade unions is declared to be the bargaining agent under subsection 6 and it is not already bound by a collective agreement with the successor employer with respect to the employees for whom it is declared to be the bargaining agent, it is entitled to give to the employer a written notice of its desire to bargain with a view to making a collective agreement, and such notice has the same effect as a notice under section 13.

Powers of Board before disposing of application

(8) Before disposing of any application under this section, the Board may make such inquiry, may require the production of such evidence and the doing of such things, or may hold such representation votes, as it considers appropriate.

Where employer not required to bargain

(9) Where an application is made under this section, an employer is not required, notwithstanding that a notice has been given by a trade union or council of trade unions, to bargain with that trade union or council of trade unions concerning the employees to whom the application relates until the Board has disposed of the application and has declared which trade union or council of trade unions, if any, has the right to bargain with the employer on behalf of the employees concerned in the application.

Effect of notice or declaration

(10) For the purposes of sections 5, 49, 51, 53 and 112, a notice given by a trade union or council of trade unions under subsection 3 or a declaration made by the Board under subsection 6 has the same effect as a certification under section 7. R.S.O. 1970, c. 232, s. 55 (4-10).

Successor municipalities R.S.O. 1970, c. 118

(11) Where one or more municipalities as defined in *The Municipal Affairs Act* is erected into another municipality, or two or more such municipalities are amalgamated, united or otherwise joined together, or all or part of one such municipality is annexed, attached or added to another such municipality, the employees of the municipalities concerned shall be deemed to have been intermingled, and,

(*a*) the Board may exercise the like powers as it may exercise under subsections 6 and 8 with respect to the sale of a business under this section;

(*b*) the new or enlarged municipality has the like rights and obligations as a person to whom a business is sold under this section and who intermingles the employees of one of his businesses with those of another of his businesses; and

(*c*) any trade union or council of trade unions concerned has the like rights and obligations as it would have in the case of the intermingling of employees in two or more businesses under this section. R.S.O. 1970, c. 232, s. 55 (11); 1972, c. 1, s. 104 (6).

Power of Board to determine whether sale

(12) Where, on any application under this section or in any other proceeding before the Board, a question arises as to whether a business has been sold by one employer to another, the Board shall determine the question and its decision thereon is final and conclusive for the purposes of this Act. R.S.O. 1970, c. 232, s. 55 (12).

Duty of respondents

(13) Where, on an application under this section, a trade union alleges that the sale of a business has occurred, the respondents to the application shall adduce at the hearing all facts within their knowledge that are material to the allegation. 1975, c. 76, s. 15 (2).

UNFAIR PRACTICES

Employers, etc., not to interfere with unions

56. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence. R.S.O. 1970, c. 232, s. 56.

Unions not to interfere with employers' organizations

57. No trade union and no person acting on behalf of a trade union shall participate in or interfere with the formation or administration of an employers' organization or contribute financial or other support to an employers' organization. R.S.O. 1970, c. 232, s. 57.

Employers not to interfere with employees' rights

58. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

(*a*) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard

to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;

(*b*) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or

(*c*) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act. R.S.O. 1970, c. 232, s. 58.

Intimidation and coercion

61. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act. R.S.O. 1970, c. 232, s. 61.

Reference of questions

96.—(1) Where a request is made under section 15 or subsection 4 of section 37, the Minister may refer to the Board any question that arises that in his opinion relates to his authority to make an appointment under any such provision that is mentioned in the reference, and the Board shall report to the Minister its decision on the question.

Idem

(2) Where a question referred under subsection 1 involves an issue as to whether one trade union is the successor of another trade union or whether a business has been sold by one employer to another or where such question involves an issue under subsection 11 of section 55, the Board has the same powers and authority as it has under section 54 or 55, as the case may be, as if an application had been made thereunder, and the Board may issue such directions as to the conduct of the proceedings as it considers advisable. R.S.O. 1970, c. 232, s. 96.

Board's orders not subject to review

97. No decision, order, direction, declaration or ruling of the Board shall be questioned or reviewed in any court, and no order shall be made or process entered, or proceedings taken in any court, whether by way of injunction, declaratory judgment, certiorari, mandamus, prohibition, quo warranto, or otherwise, to question, review, prohibit or restrain the Board or any of its proceedings. R.S.O. 1970, c. 232, s. 97.

Jurisdiction

95.—(1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

KF
3321
.M138
c.1
MacDowell, R.O.
SUCCESSOR RIGHTS AND RELATED EMPLOYER PROVISIONS OF OLR ACT

KF
3321
.M138
c.1

O.L.R.B.
LIBRARY